United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 21212

SHARON DE LANGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court
For the Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

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STATEMENT OF JURISDICTION

The Appellant, Sharon De Lange, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346 (b) for negligent examination by appellee's doctors. The matter was tried in the United States District Court for the Southern District of California, Southern Division, before the Honorable Fred Kunzel, United States District Judge. On June 14, 1966, judgment was entered in favor of defendant United States of America, the Court holding that appellant's action was one based upon misrepresentation and accordingly exempted by 28 U.S.C. 2680 (h).

Appeal from this ruling is taken pursuant to 28 U.S.C. 1291. Appellant

of this Court.

SPECIFICATION OF ERROR

The District Court erred in the following respect:

1) In deciding that the exemption set forth in Subsection (h) of Section 2680, Title 28 U.S.C. applies to this case so as to preclude this action from being brough under the Federal Tort Claims Act.

STATEMENT OF THE CASE

A. QUESTION INVOLVED.

The single question of law presented to the Court is whether Congress intended to exempt the United States from liability for a negligent diagnosis which wa communicated, when it used the term "misrepresentation" in 28 U.S.C. Section 2680 (h).

B. STATEMENT OF FACTS.

Appellant, a 37-year-old Naval dependent, was, in 1964, employed as a waitress at the Chief Petty Officers' Club, United States Naval Training Center, San Diego, California. She had been employed as such for approximately 13 months prior to the incident in question.

On July 8, 1964, appellant, in her capacity as an employee, was required t take a routine physical examination consisting of a chest x-ray and blood test. The tests were given at the Naval dispensary, WAVE'S Sick Barracks, at the Training Center. After the examination, appellant was notified, over the telephon that the blood test had to be repeated. She reported for a second blood test on

"doubtful positive". On July 20th, appellant received a telephone call from someone who identified himself as a Chief at the Naval Dispensary. The Chief told appellant not to report to work because she had syphilis. Appellant then asked to talk to the doctor in charge and a Dr. Emanuel talked with her and advised her to go to a private physician because she had syphilis. Appellant, upon being informed she had syphilis, became extremely upset and hysterical.

On July 20, immediately after being told she had syphilis, on her own volition, appellant took three separate blood tests; one at the Public Health Center, one at the United States Naval Hospital and another from a private physician. The results of these tests were negative and that the previous tests at the Training Center were in error.

On July 21, appellant went to the Naval Training Center and there saw Dr. Clarence P. Judge, who requested she go to the Naval Hospital and see a Dr. Brothers in dermatology, which she did on the same day.

Dr. Judge testified that appellant appeared very upset and on the slip which was sent with appellant to the Naval Hospital he noted "she has been unduly frightened by the possibility of lues". Dr. Judge explained that the word "lues" is used in place of syphilis. The further examination and blood test at the Naval Hospital was negative.

Dr. Judge further testified that the blood test given at the Naval Training Center is known as a broad spectrum test and is not refined enough to rule out such other diseases besides syphilis as malaria, measles and mononucleosis, where there is a positive reaction. He further stated that when the test indicates a positive

the exact cause of the reaction and that the facilities for giving the further tests are not available at the Naval Training Center.

Appellant's immediate hysterical condition and her subsequent physical suffering were directly caused by her having been told she had syphilis

(It should be made clear that the above Statement of Facts is largely taken from the memorandum of Judge Fred Kunzel and any conclusions stated above are conclusions of the Court itself and are Findings of Fact of the said Court.)

SUMMARY OF ARGUMENT

Title 28 U.S.C. Section 2680 (h) excludes "Any claim arising out of . . . misrepresentation, deceit, . . . (Emphasis added)".

The government contends that the statement to appellant, to the effect that she had syphilis, was a misrepresentation and as such comes within the exception contained in 2680(h).

The appellant asserts that the Supreme Court in the case of USA v. Neustad 366 U.S. 696, 81 S.Ct. 1294, 6 L ed.2d 614, 1961, included in its decision a comment, by way of footnote, suggesting that the misrepresentation and deceit exclusion may be confined to conduct involving business transactions. Appellant, therefore, argues that the case at bar does not, in the words of the Supreme Court "arise out of . . . misrepresentation" any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. That therefore, the case at bar does not come within the misrepresentation of Title 28 U.S.C. Section 2680(h).

1) From the negligent and wrong conclusion drawn by government personnel from the routine blood test; based upon inadequate information;

2) From improper reliance of government personnel on the conclusion reached by the blood test;

3) From Dr. Emanuel's negligence in failing to give a complete physical examination prior to any notification to appellant;

4) Finally, the negligent communication to appellant serves as only one additional negligent act.

ARGUMENT

A. THE CASE AT BAR DOES NOT ARISE OUT OF MISREPRESENTATION AND THEREFORE DOES NOT COME WITHIN THE MISREPRESENTATION SECTION OF TITLE 28 U.S.C. SECTION 2680(h)

The cornerstone of appellant's position in the final footnote to the Supreme Court decision of United States v Neustadt (supra).

> "Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co v. United States, 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not 'arise out of . . . misrepresentation,' any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent

> in the generic sense of that word, but '[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' Prosser, Torts, §85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed). See also 2 Harper and James, Torts, §29.13, at 1655 (1956)."

It must be noted first that the Court clearly distinguishes one actual decision and a large group of fact situations from the business situation in Neustadt. The Court clearly states that the damages caused by the negligent failure to maintain a beacon lamp in a lighthouse does not "arise out of . . . misrepresentation". They further distinguish the negligence of a motor vehicle operator in giving a misleading turn signal. The damages in both of these fact situations, like the case at bar, are ultimately precipitated by a misrepresentation if we use that word in its generic sense; however, these situations, like the case at bar, clearly arise out of negligent conduct in all of its legal aspects.

In the case of Indian Towing Company v. U.S., 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955), the negligent conduct was the failure to properly maintain a beacon lamp. It was this conduct that ultimately brought about the damage to the vessel that ran aground.

In essence, the absence of the beacon light as a warning to plaintiff constituted a misrepresentation by the Coast Guard to plaintiff, since it implied that

to have their vessel run aground. The Supreme Court held that plaintiff was entitled to recover under the Federal Tort Claims Act on the basis of defendant's negligence. At no time did the Court consider that plaintiff's cause of action was in any way subject to the exclusionary provisions of 2680(h).

The Neustadt case confirms this position by directly saying that although the damages in such a case, as Indian Towing, were in the final analysis caused by a misrepresentation, the damage actually arose out of the negligent conduct of the Coast Guard in failing to properly maintain the beacon lamp.

In the case at bar, the damages were ultimately caused by the communicated misdiagnosis, however, they arose out of the failure of the United States to properly diagnose the appellant's condition.

As stated in Prosser on Tort, Section 100 "Remedies for Misrepresentation" at page 697, "a great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of personal property, are in their essence nothing more than misrepresentation. From a misleading signal by the driver of an automobile about to make a turn, or the assurance that a danger does not exist, to false statements concerning a chattel sold, or non-disclosure of a latent defect by one who is under a duty to give warning. . . . in all such cases the particular form which the defendant's conduct has taken has become relatively unimportant and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the Courts nor legal writers have found any occasion to regard it as a separate basis of liability". However, as we see before us, the Federal Courts have found it necessary to make such a distinction as a distinc-

B. THE BASIC DISTINCTION TO BE DRAWN IS BETWEEN THE BUSINESS TYPE CASE AND THE TYPE OF MATTER WHERE THE NEGLIGENT USE OF LANGUAGE GIVES RIGHTS TO PHYSICAL INJURY TO PERSON OR PROPERTY.

The decisions in this area fall into three basic categories:

1) The pure business type case where the use of language causes no direct personal injury to health and well being or property damage;

2) Misrepresentation resulting in personal injury or property damage where such injuries come as a result of negligently prepared weather reports and hurricane and flood warnings gratuitously disseminated;

3) Misrepresentation resulting in personal injury to health or well being on property damage directly caused by words spoken directly to the other party.

The rationale in question was adopted in the Neustadt case (A claim by a purchaser of a home who, in reliance upon a negligenc inspection and approval by an FHA appraiser, had been induced to pay more for the property than it was worth.). The Neustadt case included comment by way of footnote that the misrepresentation and deceit exclusion may be confined "very largely" to conduct involving business transaction citing both Prosser and Harper and James on Torts.

However, Neustadt failed to refer to the troublesome misrepresentation cases based upon negligently prepared weather reports and hurricane and flood warnings gratuitously disseminated by the Federal Government. In this area it should be noted that the law of negligence treats the use of language quite differently from other types of conduct. The area within which the negligent use of words may give rise to a cause of action at common law is limited; negligent words are not actionable unless uttered directly with knowledge that

they will be acted upon, to one who the speaker is bound by some relation or duty, arising out of public calling, contact or otherwise. Ultramares Corporation v. Touche, 255 NY 170, 185, 174 NE 441 (1931).

This, therefore, lists three basic requirements for creating liability in such cases:

1) Words must be spoken directly to the other party;

2) The speaker must know that they will be relied upon;

3) There must be a relation giving rise to the duty to speak with care.

This analysis would prevent recovery against the government for misinformation or misstatements made by the United States in connection with its gratuitous information disseminating services, listed above, wholly apart from the exclusionary provisions of 2680(h).

Further, it is absolutely clear that, under the above analysis and under the common law, the appellant would be entitled to recovery as a result of the conduct of the United States in the case at bar.

Dr. Emanuel spoke directly to the appellant; the appellant relied upon him as an agent of the United States; and the doctor was under a duty arising out of his public calling as a medical practitioner to speak with care.

If you distinguish the weather, hurricane and flood warnings cases as above, all that stands as an impediment to recover in the case at bar is the decision of this Court in Hungerford v. United States, 307 Fed.2d 99 (Ninth Circuit Cal. 1962). It is based upon this decision that the Court below held:

"Despite my doubt as to Congressional intent, I feel bound by the

hold that this action is one based upon misrepresentation and accordingly exempted by Section 2680(h)."

C. ANALYSIS OF THE HUNGERFORD DECISION.

In Hungerford v. U.S., the claim was for medical malpractice as in the case at bar. It was alleged that the claimant, a veteran, entered the V.A. Hospital for unaccountable blackouts, falls and severe head pains. That due to the negligent manner in which he was examined and which diagnostic tests were performed, and due to the negligent failure to make necessary diagnostic tests, it was not discovered that the plaintiff had organic brain damage of traumatic origin which could be corrected by surgery. Instead, his condition was negligently diagnosed as psychosomatic and he was so advised. He was released without the necessary surgical treatment. In ruling that the subsequent Tort Claims Act suit was not excluded by 2680(h) this Court seemed to acknowledge the incorrect diagnosis communicated to the claimant was a misrepresentation, but held that where the government is chargeable with a dual duty in ascertaining the patient's condition, i.e., a duty to advise him what his condition is, and the duty to render proper care and treatment for that condition; breach of the latter duty is accountable even though breach of the former duty is not.

In the case at bar it is absolutely clear under the decision and findings of the trial court that appellant's damages occur as a direct result of the misrepresentation of an agent of the United States; therefore, Judge Kunzel felt bound by the Court's apparent finding that in such a matter Section 2680(h) would preclude

position of asking this Court to reverse the position previously taken in the Hungerford case.

As discussed above, the Supreme Court's decision of Neustadt, though admittedly dictum, indicates that such a matter as the case at bar would require that the United States be held responsible.

Finally, it must be pointed out to the Court that the appellant has instituted an action against Dr. Emanuel individually in the State Court and this action has been served upon that doctor. As of the date of the writing of Appellant's Opening Brief, Dr. Emanuel has not filed his answer to the complaint.

Appellant's action points up a question of pure public policy that must be demonstrated to this Court as part and parcel of an analysis of this type of fact situation.

To relieve the United States of responsibility in the case of a communicated diagnosis places solely upon the individual physician the responsibility and burden of its correctness and ultimately, if he proves to be incorrect, the added burden of personally defending his position in a Court of law and, if his error proves to be a negligent one, the horrendous burden of paying in money for his error. This, in its turn, promotes the practice of bad medicine in that the physician employed by the United States would be reluctant to communicate any diagnosis in the fear of taking a personal responsibility for any possible error.

It is also obvious that the government doctor will be required to contract for medical malpractice insurance to protect his personal savings from liability.

CONCLUSION

The facts of the case at bar cry out for reversal of the position taken by this court in the Hungerford case. The appellant's damage does not "arise out of misrepresentation". It arises from:

1) The negligent and wrong conclusion drawn by government personnel from the routine blood test based upon inadequate information;

2) From improper reliance of government personnel on the conclusion reached by the blood test;

3) From Dr. Emanuel's negligence in failing to give a complete physical examination prior to any notification to appellant;

4) Finally, the negligent communication to appellant serves as only one additional negligent act.

All of the acts listed above play a substantial role in bringing about the damages herein sustained. Can the United States rid itself of responsibility for all the above negligent conduct by communicating it to the appellant within an exception to Title 28 U.S.C. Section 2680(h)?

Respectfully submitted,

BEAR, GELFAND, GREER & BAUER

By: /s/ MICHAEL I. GREER

Attorneys for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ MICHAEL I GREER